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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DONALD J. TRUMP ,

4 Plaintiff,

5 v.

19 CV 8694 (VM)

6 CYRUS R. VANCE, ET AL.,

7 Defendants.

-----x

8 New York, N.Y.
September 25, 2019
9:30 a.m.

9 Before:

HON. VICTOR MARRERO

10 District Judge

11 APPEARANCES

12 CONSOVOY MCCARTHY

13 BY: WILLIAM CONSOVOY

CAMERON NORRIS

14 -and-

MUKASEY FRENCHMAN & SKLAROFF

15 BY: MARC LEE MUKASEY

-and-

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18 NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE

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20 ALLEN VICKEY

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22 BLANK ROME

Attorneys for Defendant Mazars USA, LLP

23 BY: JERRY D. BERNSTEIN

INBAL PAZ GARRITY

24 NICHOLAS TAMBONE

25 MICHAEL MULLMAN

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1 THE COURT: Good morning. Thank you. Be seated.

2 This is a proceeding in the matter of Trump v. Vance,
3 et al. It's docket no. 19 CV 8694.

4 Counsel please enter your appearances for the record.

5 MR. CONSOVOY: Good morning, your Honor. William
6 Consovoy on behalf of the president. With me this morning from
7 my law firm is Cameron Norris.

8 MR. MUKASEY: Good morning, your Honor. Marc Mukasey
9 from Mukasey Frenchman & Sklaroff also for the president.

10 MR. FUTERFAS: Good morning, your Honor. Alan
11 Futerfas for the president as well. Thank you.

12 MR. DUNNE: Judge, Carey Dunne from the Office of the
13 New York County District Attorney.

14 MR. SHINEROCK: Good morning, your Honor. Solomon
15 Shinerock on behalf of the Office of the District Attorney.

16 MR. VICKEY: Good morning, your Honor. Alan Vickey on
17 behalf of the district attorney's office.

18 MR. GRAHAM: Good morning, your honor. James Graham
19 on behalf of the district attorney's office.

20 MR. CONROY: Good morning. Christopher Conroy on
21 behalf of the district attorney's office.

22 MR. BERNSTEIN: Good morning, your Honor. Jerry
23 Bernstein from Blank Rome LLP for Mazars USA LLP.

24 MS. GARRITY: Good morning, your Honor. Inbal Garrity
25 on behalf of Mazars USA LLP.

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1 MR. TAMBONE: Good morning, your Honor. Nick Tambone
2 from Blank Rome for defendant.

3 MR. MULLMAN: Michael Mullman on behalf of Mazars LLP.

4 THE COURT: Let me note that the Court received a
5 filing in this matter submitted last night on behalf of the
6 United States Attorney for this district and it is labeled
7 Statement of the United States in Support of Temporary
8 Restraining Order to Allow Time for the United States to
9 Consider Whether to Participate in this Proceeding.

10 This proceeding was initiated by submission from the
11 plaintiff seeking a restraining order to enjoin the enforcement
12 of a subpoena that was initiated and served by the district
13 attorney for the County of New York against one of the
14 defendants Mazars USA LLP.

15 Let me first ask whether the district attorney has
16 received a copy of the statement from the U.S. Attorney
17 regarding this matter and whether they may have a view as to
18 the appropriateness of the request from the U.S. Attorney.

19 MR. SHINEROCK: Thank you, your Honor.

20 May I be heard on that discrete now if that's what you
21 wish?

22 THE COURT: Yes.

23 MR. SHINEROCK: We did receive the statement. We were
24 surprised to receive the statement last night. The statement
25 in effect requests additional delay of three weeks for

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1 resolution of this matter. And while we recognize that the
2 U.S. Attorney's Office may wish to be heard here, we question
3 whether they should be heard to arrive at the eleventh hour and
4 request such a delay when the parties have, by agreement,
5 labored, as the Court has I'm sure, to prepare the emergency
6 relief motion for adjudication today. That said, the statement
7 does not change our position that compliance should begin under
8 the auspices of grand jury secrecy. No irreparable harm will
9 be done and for that matter while the U.S. Attorney's Office
10 may seek to be heard on the larger issues presented by the
11 lawsuit we don't feel that it's an appropriate impediment to
12 enforcement of the grand jury subpoena at this time.

13 THE COURT: Thank you.

14 We will take the observation of the district attorney
15 into account and perhaps return to it later.

16 Let us begin this proceeding by addressing questions
17 of housekeeping or procedural ground rules for the conduct of
18 the hearing. Thereafter we'll turn to substantive issues
19 presented by the moving papers and the arguments on the record
20 this morning.

21 First, let's go over questions of time limits. I
22 believe that about 20 minutes for each side in the first
23 instance will be enough. If you were in the Court of Appeals
24 Second Circuit you would probably be lucky to get fifteen
25 minutes.

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1 Before explaining the approach that I plan to take to
2 follow the management of the allocation of the time that I have
3 allotted, I will exercise the privilege and prerogative of the
4 bench to vent one of my pet peeves with a different practice
5 that is common among appellate judges, the United States
6 Supreme Court perhaps the worst offender in this regard. I am
7 certain that this is a practice that most litigators deplore.
8 Taking a small measure of judicial license, I will give you a
9 fictional illustration of the problem.

10 Attorneys are scheduled for oral argument on a complex
11 legal question of grave consequences to the client, the lawyers
12 and to the public, and the matter at hand is one that could
13 potentially shape the pillars of the republic. For this
14 purpose each the lawyers involved spends weeks or even months
15 preparing, refining, and rehearsing the presentation to the
16 court. When they have the matter down pat, the argument is
17 then compressed to the second precisely within the 20-minute
18 timeframe that the court has given each side. Then the
19 presentation begins. Before the speaker finishes the first
20 sentence, a judge interrupts with a question. Then another
21 judge jumps in now with a question, and then another, any one
22 of which may be entirely on a different issue. The net effect
23 is to throw off course not only the attorney's timing but the
24 sequence, flow, and stride of their argument which in some
25 cases counsel can never recover because by the time the judge's

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1 questioning is over and the speaker can return to where the
2 argument left off the presiding judge reminds the attorney that
3 they have two minutes left to wrap up.

4 Accordingly, to make the amount of time that I have
5 specified for argument meaningful, I will do two things.
6 First, my general practice is to allow the parties to speak
7 without interruption for questions during at least the first
8 seven minutes of their arguments. Second, coming back to the
9 purpose of this proceeding so as to focus the hearing on the
10 relevant questions and prevent rehashing of matters that you
11 already laid out in your papers as well as to minimize court
12 intrusion into your argument, I will highlight some threshold
13 issues which your presentation should concentrate on because I
14 regard them as potentially dispositive initial matters and
15 because some of them implicate jurisdictional questions.

16 First, this case entails a subpoena issued by a state
17 grand jury and panel in connection with an investigation
18 conducted by a New York County prosecutor. I note that the tax
19 records and perhaps other financial documents that are the
20 subject of the district attorney's subpoena relate to years
21 going back to 2011. That, of course, encompasses a period long
22 before this president assumed office. In this connection,
23 several questions arise.

24 Do the tax returns and records covered by the district
25 attorney's investigation pertain to actions and transactions

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1 involving only the president or third persons and businesses
2 related to the president or to a combination of both acting in
3 concert?

4 Do the matters under the district attorney's
5 investigation relate to potential misconduct that arises only
6 under state law or only under federal law or under both state
7 and federal law?

8 To the extent any actions involving the president may
9 be involved, do they relate to his official acts or to private
10 conduct of the president as an ordinary citizen?

11 To what extent are the matters at issue subject to
12 statutory limitations that may soon expire as to the president
13 or as to third parties?

14 What is the constitutional or statutory source for the
15 relief sought and for this court to exercise jurisdiction to
16 hear the underlying dispute.

17 Is 42 U.S.C. Section 1983, as the president now claims
18 in an amended complaint, a proper vehicle for the adjudication
19 of this case in federal court as a declaration of rights,
20 privileges and immunity secured by the Constitution or is there
21 any relief that, if warranted, could not be accorded to the
22 president in a state court?

23 Second, another set of issues implicates principles of
24 federalism and comity. The president is asking a federal court
25 to enjoin proceedings undertaken under authority of state law

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1 enforcement officers before institution of a state's
2 administration of justice. Would the court granting the
3 injunctive relief requested violate the fundamental document
4 embodied in Younger v. Harris and the Anti Injunction Act
5 counseling against federal interference with ongoing state
6 legal prosecutions, civil enforcement proceedings or judicial
7 functions that involve important state interests.

8 Next, assuming the Court exercises jurisdiction to
9 consider the president's request for injunctive relief
10 restraining the enforcement of a grand jury subpoena, has the
11 plaintiff's application adequately satisfied the requisite
12 showing of irreparable harm and a likelihood of success on the
13 merits?

14 Regarding the first prong, the Court notes that the
15 subpoena issued by the grand jury is directed not at the
16 president but at a third party and that any documents produced
17 in compliance would be part of a confidential investigation
18 protected from public disclosure by the rule of grand jury
19 secrecy as the district attorney argues. What is the real and
20 immediate threat of actual harm under these circumstances?

21 Regarding the likelihood of success on the merits, the
22 president's request rests on an implication of an absolute
23 immunity from indictment, prosecution, trial, or other
24 application of criminal process that, as claimed, would extend
25 not only to the president but to his private financial affairs

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1 as well as those of his businesses and corresponding
2 associates. Is there basis in the constitutional text, history
3 or judicial interpretation supporting such a proposition?

4 If the president why entitled to immunity from
5 criminal process, would that apply to responding to the request
6 for information during a criminal investigation involving not
7 only himself but third parties?

8 The president argues that the Department of Justice
9 and legal commentators agree that the president cannot be
10 subject to criminal process. What is the definition of
11 criminal process? Does it entail investigation, indictment,
12 prosecution, trial, imprisonment, or any one or combination of
13 these?

14 The president relies on a legal memorandum issued by
15 the Office of Legal Counsel in October of 2000. That memo
16 itself says that a grand jury could continue to gather evidence
17 throughout the period of immunity even passing the task to a
18 subsequent grand juries.

19 Next, there is a question as to whether the president
20 can be subpoenaed and/or directed to respond to a subpoena. In
21 this regard, there is precedent from the United States Supreme
22 Court and appellate courts. In United States v. Nixon the
23 Court rejected a claim by the president of absolute privilege
24 based on separation of powers in relation to materials sought
25 related to the president's performance of duties of the

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1 president and involving disclosure of discussions between the
2 president and his aids. The district attorney here in turn has
3 called to our attention conflicted historical evidence. In
4 this regard, the historical record I believe is mixed at best
5 and perhaps you could get into some specifics later on that
6 point.

7 Let me conclude with another reference to a memorandum
8 issued by the Office of Legal Counsel on which the president's
9 presentation substantially relies. That memorandum states,
10 "Thus, it appears that under our Constitution's plan it cannot
11 be said either that the courts have the same jurisdiction over
12 the president as if he were an ordinary citizen or that the
13 president is absolutely immune from the jurisdiction of the
14 courts in regards to any kind of claim. The proper approach is
15 to find the proper balance between the normal functions of the
16 courts and the special responsibilities and functions of the
17 presidency."

18 With that as background let us then turn to the
19 presentations. This matter having been initiated by the
20 president, you have the floor.

21 MR. CONSOVOY: Thank you, your Honor.

22 Good morning, your Honor. May it please the Court.
23 Thank you for hearing us this morning on this expedited
24 schedule.

25 If I might begin with a few procedural points and then

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1 I will turn to the Court's questions and answer them as best I
2 can.

3 From the perspective of the president, we are not here
4 this morning seeking a permanent resolution of this dispute nor
5 are we asking the court to enter a preliminary injunction this
6 morning although that is certainly an option the court, of
7 course, has. What the president is asking for this morning is
8 what Congress has twice agreed to and what the New York
9 Attorney General has once agreed to in similar cases that are
10 pending now, which is an orderly process that allows the
11 serious constitutional questions to be adjudicated carefully
12 and thoughtfully that preserves the president's right to be
13 heard and allows him a reasonable chance to appeal any adverse
14 decision that might alter the status quo. That is a quite
15 limited relief that will allow what I believe are concededly
16 serious questions to be adjudicated. It affords the U.S.
17 Attorney the opportunity to be heard which has now been sought
18 in a week and eliminates the need for emergency appeals as
19 early as this afternoon to the appellate courts in order to
20 preserve the status quo. If that is what is sought, then I
21 think that limited showing has easily been made by the
22 president's papers.

23 The Court asked a series of questions about the case,
24 the first set dealing with questions that, in all candor, the
25 president can't answer, which is the nature of the

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1 investigation, what is being sought, and why it's being sought,
2 and what's being pursued. The first paragraph of the
3 declaration submitted was redacted. The president has no
4 access to it. And so we look forward to the answers by my
5 friend from the district attorney's office that would provide
6 more insight into the nature of the inquiry.

7 What we do know, your Honor, is the subpoena that was
8 sent to Mazars is in all respects a carbon copy of a subpoena
9 that the House Oversight Committee sent to Mazars earlier this
10 year which is now the subject of parallel litigation.

11 The idea that this office's investigation perfectly
12 replicates an Oversight Committee investigation, plus it just
13 so happens to want one additional thing which are the tax
14 returns that the Ways and Means Committee sought can't be a
15 coincidence. The notion that their investigation or state law
16 perfectly parallels what is claimed to be a federal
17 investigation about federal issues ranging on emoluments to
18 other matters somehow is exactly what this office in good faith
19 needs to pursue a state law investigation is difficult to
20 accept.

21 But the big question, as your Honor pointed out, is
22 whether the president can make a four-factor test for a
23 temporary restraining order or a preliminary injunction. We
24 think we do.

25 Your Honor asked about the nature of the

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1 constitutional claim here. We believe it's brought under
2 Article II, under the Supremacy Clause, and under the structure
3 of the Constitution itself, no different than many cases that
4 are brought under the Constitution. The cases -- many cases
5 vindicate separation of powers in this matter. Appointment of
6 clause cases do. Cases like Printz do. Many, many cases.
7 1983 is an available vehicle. This is a right the president
8 holds and a privilege the president holds under the
9 Constitution, as alleged. And we're simply at the allegation
10 stage of this case. He is alleging that his right to temporary
11 immunity, which is what the Office of Legal Counsel has called
12 it, while he is president, meaning he cannot be subject to
13 criminal process. And I will endeavor to answer your question
14 about what that means as well, your Honor. He cannot be
15 subject to criminal process while in office. That doesn't
16 immunize him permanently. It means that while he is the
17 commander in chief of our nation, 50 states can't decide that
18 they are going to investigate the president while he tries to
19 serve us as a country. That is a job for Congress with
20 impeachment power, if it so chooses to exercise it. That is
21 what the framers of our Constitution said. That is what the
22 text of the Constitution provides. And with all respect for my
23 friends I do not believe it is a close question. The idea that
24 any state, New York or any other, could decide that they would
25 indict a sitting president, there is no support for that while

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1 he is president. The framers said during the debates that once
2 the president was impeached and removed, if that were to occur,
3 then he would be subject to ordinary process. The text of the
4 Constitution says it as well that once removed the courts could
5 have recourse to the president like any other citizen, but not
6 while he is in office.

7 Once that proposition is accepted, I think there are
8 proliferating consequences from it. And I think the OLC memos
9 from 1973 and including the Bork amicus brief and the Agnew
10 case lay that out exactly.

11 Your Honor, if you look at that brief that we cite.
12 You're right, your Honor. This is a balancing test. And the
13 Office of Legal Counsel decided the vice-president was not like
14 the president for many reasons and, therefore, would not be
15 entitled to this type of immunity. And one of the reasons that
16 brief gave, your Honor, was that the consequences would be
17 somewhat large because it might impede a grand jury
18 investigation. There would be no point to saying that and
19 saying it differently about the president if that weren't how
20 the Office of Legal Counsel understood the Constitution to
21 function.

22 Even in Clinton v. Jones the Court Supreme Court drew
23 two important distinctions. One, the Court said do not assume
24 that allowing a challenge of unofficial act in state court
25 would be permitted. That's an open question. And two, we are

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1 not here deciding today whether the president could be made to
2 appear in any particular place at any particular time or be
3 held in contempt.

4 But, your Honor, if you accept the proposition of the
5 district attorney's office, this is not just about a subpoena
6 for documents. Those same powers could command the president
7 to appear at a particular place, at a particular time, could
8 hold him in contempt, two propositions that I think no Supreme
9 Court decision supports.

10 Your Honor asked about United States v. Nixon. United
11 States v. Nixon was about a general confidentiality privilege
12 in regard to a third-party subpoena. It was not a criminal
13 process directed at the president. In fact, the Supreme Court,
14 in I believe footnote two or footnote three of that opinion,
15 went out of its way to note that the issues that are more
16 squarely presented here would not be decided there and
17 dismissed the crosspetition as improvidently granted. So I do
18 not believe U.S. v. Nixon supports the district attorney's
19 position. I think the Court's decision to avoid that question
20 more squarely supports the president's.

21 And I'm happy to return to the merits issues, your
22 Honor, as we proceed but I think it's important to remember
23 that the only question for the Court is whether this is a
24 serious question, whether the ability of the State of New York
25 to subpoena the president's documents from his custodian

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1 exceeds their power under the Constitution is a serious issue.
2 They had every opportunity to say it wasn't. The argument that
3 it's been mixed is just another way of saying it's serious.
4 And so then the question becomes who do the equitable factors
5 favor in this action.

6 Your Honor noted that there is grand jury secrecy.
7 But that's a matter of state law, your Honor. We do not know
8 how the district attorney will respond to a subpoena from
9 Congress. Would those secrecy laws trump that subpoena? Would
10 they supersede it? Would they not comply with that subpoena?
11 Is the New York legislature committing to not amending its laws
12 to change those rules? Because the president has experienced
13 from the New York legislature amendment of state law designed
14 specifically to target him.

15 I do not think the district attorney's office can make
16 either promise. And so the president, even on confidentiality,
17 is in some jeopardy.

18 But I think there's a broader point, your Honor, which
19 is any time the subject of an investigation is told to turn
20 over their documents to the government and they are forced to
21 do so the status quo is forever altered.

22 THE COURT: Seven minutes of immunity from questions
23 are up.

24 MR. CONSOVOY: I appreciate the temporary immunity,
25 your Honor.

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1 THE COURT: So let me ask first. You made reference
2 to Clinton, the Clinton case and you quoted what you thought
3 was an appropriate reference to by the Court. In that case the
4 Court looked at the history of the constitutional convention,
5 summarized what it drew to be important points from it and then
6 stated far from being above the laws the president is amenable
7 to them in his private character as a citizen. The quote
8 further said, "This description is consistent with both the
9 doctrine of president immunity as set forth in Fitzgerald..."
10 that's one of the Nixon cases "...and rejection of that
11 immunity as claimed in this case." And you may recall that in
12 that case the president also invoked a blanket absolute
13 presidential immunity even from conduct that preceded the
14 presidency. The Court then concluded, as you know, by stating
15 that the president is otherwise subject to the laws for his
16 purely private acts.

17 Now, I began by asking or noting that the documents
18 that the district attorney is seeking in this case relate back
19 to 2011 and encompasses a number of years in between and
20 encompasses potentially other individuals. To the extent that
21 those documents going back to 2011 and then up to 2016 relate
22 to purely private acts, private transactions of the president,
23 to what extent is that not covered by the Clinton case?

24 MR. CONSOVOY: I think it is not covered. I think,
25 your Honor, because in the Clinton case the Court said it is

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1 dealing with a civil action, not a criminal action.

2 THE COURT: We don't know. In this case the district
3 attorney has not said that what he is seeking as it relates to
4 the president is a criminal investigation or maybe just
5 documents that may relate to a criminal investigation of third
6 parties. That's not clear on this record.

7 MR. CONSOVOY: That is true, your Honor. Two points.
8 One, if this is not a criminal investigation I'd be interested
9 to hear that.

10 THE COURT: I said criminal investigation of the
11 president.

12 MR. CONSOVOY: That was my second point.

13 THE COURT: As opposed to third parties.

14 MR. CONSOVOY: The issue here is who the process is
15 directed at. So -- and we stated in our papers -- let me
16 answer it two ways. We stated in our papers that we believe
17 the president is a target of this investigation; that he is at
18 least partly the subject of it. There was nothing in the
19 responsive papers that disclaim that understanding. If it is
20 going to be fully disclaimed today that the president or his
21 businesses are not targets, if they are true third parties,
22 then that may create different questions.

23 THE COURT: Let me interrupt. Sorry. You mentioned
24 the president or his businesses. What do the businesses have
25 to do with presidential immunity?

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1 MR. CONSOVOY: The immunity -- well, the point of the
2 immunity is to respect the office of the president. If you
3 look at the original commentary by the framers, the reason why
4 the process was set up the way it was, was because when you
5 have a single commander in chief who deals with the world on
6 behalf of the nation it is important that, for foreign affairs
7 and domestic, that he be seen as having the full support of the
8 nation. If there is going to be a problem, Congress through
9 impeachment will address that problem for the nation. If by
10 attacking the president's businesses, by going after the
11 president through his businesses you implicate all of the same
12 interests that the framers were concerned about when they
13 drafted the Constitution the way they did.

14 THE COURT: Are you suggesting that the businesses
15 could not as individual entities also engage in misconduct
16 including criminal conduct?

17 Let us suppose for a moment that one of the businesses
18 did not file taxes or falsified documents in the filing of
19 taxes, are you saying that that business, because it's part of
20 the president's financial matters are not subject to
21 prosecution for criminal conduct that occurred before the
22 president was president?

23 MR. CONSOVOY: No. As you said earlier, this a
24 balancing question. And I think both the Supreme Court through
25 the two Nixon cases, in Clinton v. Jones, and in the Office of

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1 Legal Counsel memo has made clear -- and in the Bork memo too,
2 brief too, that the Court has to take each of these cases as it
3 finds them and try to balance between these two pillars. And I
4 think what the Court would have to assure itself of is that
5 those actions by those businesses are not a means to target the
6 president and would not implicate the president in any finding
7 against those corporations. That is why in the Nixon opinion
8 the Court went out of its way in the footnote to say it was
9 different about the unindicted coconspirator aspect of that
10 case and the truly third-party aspect of the disclosure of the
11 recordings to the grand jury. The Court saw those as two --
12 even though the president was an unindicted coconspirator, that
13 same question could have been posed there. Well not indicted,
14 these are just about third parties. The Court saw that as
15 different. Didn't decide it. Completely agree. But it saw it
16 as distinct.

17 And that raises the case here, which is if in a case
18 if the district attorney could show that it is targeting a
19 business that the president happens to own but in no way
20 seeking to target the president through that action would
21 implicate him in the wrongdoing, that might be a different
22 case. But there has been no such assertion here, certainly not
23 in the papers that we've seen. And so we do think the
24 interests are squarely implicated. It is a -- your Honor, and
25 I would concede. There is some breadth to that argument. I

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1 readily concede that.

2 THE COURT: It's a chicken-and-egg situation. How
3 would the district attorney know that the businesses of the
4 president may have engaged in criminal conduct unless it
5 investigates. But you're saying that they cannot investigate
6 because it may spillover into the president.

7 MR. CONSOVOY: It's true.

8 THE COURT: In the meantime, let's pose the other
9 issue. What happens if it's a statute of limitations about to
10 expire? Does that mean that the business in effect gets off
11 scot-free? Riding on the president's coattails?

12 MR. CONSOVOY: So if I could take those two
13 separately.

14 On the chicken or egg thing, somebody has to bear the
15 burden. When you have structural constitutional principles,
16 inevitably there will be close cases where one party has to
17 bear the burden of proof. In this situation where we're
18 dealing with Article II of the Constitution, which is unique
19 from all branches, when you're dealing with an office that is
20 unique among all offices and you have a supremacy clause, the
21 district attorney would have to bear the burden of convincing
22 the court that this could in no way implicate the president.
23 That was the point that the Bork memo made in the Agnew case.
24 That was why the Office of Legal Counsel drew the circle in pen
25 only around the presidency, not around the vice-presidency, not

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1 around the judiciary, and not around other civil officers
2 because the office understood that there could be some broader
3 implications about those -- the ability to go after people
4 either related to the president or involved with the president
5 and that is the cost of having a unitary executive. That is
6 the choice the framers of our Constitution made.

7 Secondly, on statute of limitations, your Honor, as
8 the Office of Legal Counsel noted, it's an open question.
9 New York legislature can solve the problem itself by extending
10 limitations periods. It's possible that we could agree to
11 tolling in order to litigate these issues and resolve this.

12 THE COURT: Would that raise any possible ex-post
13 questions?

14 MR. CONSOVOY: Well I think how they do it matters of
15 course. You have to -- they would have to generally extend the
16 limitations period.

17 But my point is that the legislature is not without
18 redress. What the Office of Legal Counsel said -- and I think
19 the Court would have to reject the opinion to conclude
20 otherwise -- which is even if that's true, even if limitations
21 periods will expire, even if people who are affiliated with the
22 president, it is more difficult to prosecute them, the cost to
23 the nation of allowing this to occur outweigh the rights of the
24 states in this narrow setting.

25 Your Honor, I think if we're going to address this

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1 practically, whatever the Court rules, if the Court rules that
2 the district attorney can do this, then all 50 states can do
3 this for any of unofficial action the president took before the
4 presidency, during the presidency. That is untenable. The
5 notion that 50 states could decide together we don't like this
6 president or we're going to assert our rights and do that is
7 inappropriate under our Constitution.

8 THE COURT: In reality our country has been in
9 existence since 1789. How frequently has it happened that 50
10 states have conspired to somehow undermine the presidency? How
11 likely is it that that might -- scenario might occur?

12 MR. CONSOVOY: I actually think -- it not happening I
13 think actually supports us, your Honor, in that I don't think
14 anybody even considered this possibility. I think it is so
15 well settled the idea that a state could indict and then
16 charge, arrest, detain a sitting president is so beyond the
17 pale constitutionally that before today I'm not sure a state
18 would have considered it. If your Honor endorses what the
19 district attorney has done here, I do not think it's
20 unrealistic to think that future presidents may experience a
21 far wider range of challenges by states than our country has
22 ever experienced before.

23 THE COURT: Let's take the case of Vice-President
24 Burr. Would it have been envisioned in 1789 that a state would
25 indict a vice-president?

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1 MR. CONSOVOY: I think -- actually yes. When you look
2 at the history of the convention, and the Bork memo actually
3 walks through this, all of the discussions around protection
4 were about the presidency.

5 Now, obviously, Burr shooting Hamilton was unexpected
6 in and of itself. And the case in Burr -- actually, your
7 Honor, I was looking at this last night -- was actually
8 interesting because I think it has been misdescribed. There
9 were two state prosecutions with Burr. And then there was the
10 treason charge brought by Jefferson. The subpoena issued there
11 was in response, if you look at the Bybee memo that we cite the
12 article -- the subpoena there was issued by Burr for
13 exculpatory evidence. And what Chief Justice Marshall held was
14 that having initiated the treason charge effectively the
15 presidency had waived the right to object to a subpoena in that
16 case. That is, of course, far afield from here.

17 So to answer your question directly I think it was --
18 yes, it was contemplated that a vice-president could be
19 prosecuted. There is no contemplation about the presidency
20 though. Because the country can persist without a
21 vice-president. A president subject to proceedings in a state
22 court, the distraction that would create, the multitude of
23 problems that could arise are unique and different in both
24 degree and kind from anything that would attend to a proceeding
25 against the vice-president.

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1 Your Honor, on the irreparability issue, again, that
2 argument, that secrecy defeats irreparability would then
3 therefore apply to any citizen who is subject to a subpoena if
4 they wanted to assert their Fourth Amendment rights, their
5 Fifth Amendment rights or any other right. The idea that they
6 have nothing to worry about because, don't worry, it's only
7 going to be shown to the district attorney and the grand jury
8 so why should you care about whether it's disclosed I think is
9 an unfortunate way to think about constitutional rights
10 vis-a-vis the exercise of government power and an unfair way to
11 think about it. Again, those laws could be changed. That
12 secrecy is not guaranteed. And the status quo would be forever
13 altered.

14 Moreover, the president has a confidentiality right to
15 his accounts. Once this disclosure is made that
16 confidentiality right is forever lost. And we've cited pages
17 of cases supporting the proposition that breach of
18 confidentiality can never be repaired later.

19 In contrast, the only issue on exigency that the
20 district attorney raises is the statute of limitations question
21 that we don't know, we can't even test because we haven't seen
22 the aspects of the declaration that talk about what is being
23 investigated, what those limitation periods might be and
24 whether they can be tolled.

25 THE COURT: Let me give you another minute to wrap up.

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1 MR. CONSOVOY: Yes. What I didn't touch on was
2 Younger and Anti Injunction Act, so if I could just briefly do
3 that, your Honor. Anti Injunction Act is quite simple. One,
4 it's strictly inapplicable to 1983 claims. We have stated a
5 1983 claim. We are still at the motion-to-dismiss stage.
6 Mitchum is clear law on that, which is why we do not see the
7 Anti Injunction Act raised very frequently anymore in
8 litigation because so many cases are 1983 cases. It's also
9 inapplicable because this is a case brought by the national
10 government through the presidency and the act is inapplicable
11 there. Younger is definitely inapplicable here, your Honor.
12 We've cited four reasons. I don't think any of them can be
13 refuted.

14 The Third Circuit has persuasively explained why this
15 is not an ongoing state court proceeding. What the district
16 attorney wants the president to do is initiate a new proceeding
17 and a motion to quash in state court. The Supreme Court has
18 said there is no duty, especially under 1983, to exhaust by
19 initiating a new action in state court. Even if that were not
20 true, there is no obvious vehicle for the president to
21 vindicate his rights as a third party in state court. We found
22 case law suggesting it might not be available. We have seen no
23 authority from the district attorney suggesting otherwise.
24 And, moreover, this is not the kind of case that belongs in
25 state court. This is a federal constitutional action brought

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1 by the president.

2 The Ninth Circuit has explained, for example, in
3 double jeopardy. The whole point of double jeopardy is not to
4 have to go through the state system twice. And so Younger was
5 held inapplicable to that kind of Sixth Amendment argument for
6 the same reasons that temporary immunity -- that's the Office
7 of Legal Counsel's phrase, temporary immunity -- should not be
8 litigated in state court. This a question for federal court.

9 THE COURT: Thank you.

10 You've on numerous occasions made reference to the
11 debates and the constitutional convention and the
12 constitutional history about the powers of a president and
13 immunities. I'm sure that the district attorney will also
14 invoke history and the founders and the framers and
15 commentators. Let me on that point address a point to both
16 sides that in the Youngstown Steel case Justice Jackson
17 described that when confronted with the issue concerning the
18 dimensions of the president's powers said, "Just what our
19 forefathers did envision, or would have envisioned had they
20 foreseen modern conditions, must be divined from materials
21 almost as enigmatic as the dreams Joseph was called upon to
22 interpret for Pharaoh. A century-and-a-half of partisan debate
23 and scholarly speculation yields no end results but only
24 supplies more or less apt quotations from respective sources on
25 each side. They largely cancel each other out."

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1 All right. Thank you. I will now call upon the
2 district attorney's representative.

3 MR. SHINEROCK: Thank you, Judge.

4 Again, my name is Solomon Shinerock. I'm an assistant
5 district attorney representing defendant Cy Vance in this
6 matter. I'm joined at counsel table by the District Attorney's
7 general counsel, Carey Dunne, who may also seek leave to
8 address the Court this morning.

9 Before I begin I'd like to just take a moment to walk
10 through in a procedural way some of the various requests now
11 pending before the Court. I earlier addressed the Court
12 regarding last night's request from the DOJ and the U.S.
13 Attorney's Office, and I say something similar with respect to
14 the request for some sort of stay which was made in the
15 plaintiff's filing of last night. Having agreed to a briefing
16 schedule which would speed this matter up for adjudication
17 today, we find it strange that they now assume the Court needs
18 more time to decide the emergency relief motion. In our view,
19 that is a tacit recognition that they have failed to satisfy
20 their burden under that standard and are nonetheless seeking to
21 effect an end run around that failure by somehow pulling out at
22 random regardless to the question of this stay. For that
23 reason we believe a request for a continued stay should be
24 rejected.

25 The reason for our urgency, Judge, rests on really two

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1 concerns. First, there is the sitting grand jury which is
2 impeded in the discharge of its duties by the delay occasioned
3 by this litigation raising questions regarding, as your Honor
4 referenced, statutes of limitation as well as the degradation
5 of available evidence.

6 But perhaps more fundamentally our very presence here
7 in an official capacity, as much as we're glad to be in front
8 of your Honor, our very presence here offends the principles of
9 comity underlining our federalism and Younger abstention
10 doctrine. For that reason we believe this matter should be
11 adjudicated, if at all, in the state court. And that leads
12 us -- that leads me now to our motion to dismiss should the
13 Court choose to accept that motion, we believe it should be set
14 for expedited briefing so that this matter can be fully and
15 quickly resolved for the reasons I just gave.

16 Before I get to the substance of our argument on the
17 matter before the Court today I would just like to try to
18 address some of the Court's questions related to the subpoena
19 itself and the investigation to the extent that I can do that
20 without revealing grand jury's materials, which I believe I
21 can. The subpoena is public and obviously making it public is
22 the right of the recipient, Mazars, and the plaintiff here. So
23 what I will say in response to your question is that it
24 certainly calls for documents that pertain both to the
25 president but also to a broad range of third party entities and

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1 individuals. Those documents certainly pertain to potential
2 issues under state law. They may also relate to issues under
3 federal law or federal criminal law. That's not our focus.
4 Our exclusive focus is on the state criminal law in this
5 investigation.

6 With respect to your question on the statute of
7 limitations, all I will say is that as with all criminal
8 charges there are statute of limitations issues and certainly
9 those are implicated by the type of delay that this litigation
10 threatens.

11 With respect to the contents of the subpoena, I'd like
12 to address counsel's comments regarding similarity to the House
13 Committee's subpoena to Mazars. And what I can say is that I
14 have had no contact with that committee in the context of this
15 investigation or any other. I engaged in a search for publicly
16 available information, identified that subpoena. And unable to
17 very much improve upon it, thought it would be efficient to use
18 it. But there is another reason that was important. When
19 Mazars or any party receives a subpoena of this nature it
20 generates quite a bit of workflow in identifying and gathering
21 the documents collected. The subpoena that had already been
22 served on them hopefully started that process and our view is
23 that we would gain some efficiency in having them work through
24 that process because it also mirrored certainly the scope of
25 what we needed from Mazars. The contention that somehow that

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1 means our investigation is coextensive with the investigation
2 of the House Committee I think is not supported by this issue.

3 So, I'd now like to turn to the substance of our
4 position on the motion for emergency relief. We have addressed
5 in the brief the questions of the broad presidential immunity
6 that has been claimed by the plaintiff in this case. As tricky
7 as they are, they need not be addressed by the Court to resolve
8 this matter because this Court's decision can and should rest
9 entirely on the principles underlining Younger abstention which
10 we believe disposes entirely of the case.

11 There is little question that a preindictment grand
12 jury investigation qualifies as an ongoing state criminal
13 prosecution as that term has been used in this Court's
14 abstention analysis. The Third Circuit case that the
15 plaintiffs have referenced is an outlier and has obviously been
16 disagreed with by subsequent cases in the Fourth Circuit, the
17 Eighth Circuit and the Fifth Circuit as recently as 2004, not
18 to mention by decisions of this Court which we cite in the
19 brief, a Judge Lynch decision in 2007 affirming that a grand
20 jury subpoena constitutes a state criminal proceeding for
21 abstention purposes. Judge Wood has a similar decision in 2007
22 as well.

23 There is no question that such a proceeding implicates
24 important state interests. And this Court has held on multiple
25 occasions that New York state courts present an adequate forum

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1 for the litigation of any constitutional issues arising from
2 such a state proceeding.

3 There is no credible claim here to either irreparable
4 harm, harassment, bad faith, or other equitable principle that
5 would defeat the strong policy favoring abstention in cases
6 like this one. We've demonstrated the bona fides of our grand
7 jury investigation which I think is more than we're called on
8 to do. The burden here rests on the plaintiff and their claims
9 of harassment and bad faith are speculative and unfounded in
10 the record.

11 The subpoena at issue relates to records that are
12 routinely subpoenaed. And the identity of one of the
13 individuals whose records are implicated by the subpoena,
14 namely the president, should not impact the Court's application
15 of otherwise status-neutral laws.

16 THE COURT: Mr. Shinerock, in relation to your Younger
17 argument, as you undoubtedly know, Younger was either
18 clarified, modified, and some people say narrowed by the Sprint
19 case. To what extent do you believe that Sprint in any way
20 addresses or narrows your argument?

21 MR. SHINEROCK: Your Honor, we cite the Sprint case in
22 our brief and our view is that while it may have narrowed the
23 reach of Younger in other contexts, in fact, it affirmed that
24 Younger is appropriately applied and federal courts ought to
25 abstain in criminal, state criminal proceedings. And we submit

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1 that this is exactly the type of case which is appropriate for
2 Younger abstention consistent with the Sprint decision. As my
3 colleagues have passed me a passage from the Sprint
4 Communications case, which I think directly addresses your
5 question. It says, "Younger exemplifies one class of cases in
6 which federal court abstention is required. When there is a
7 parallel pending state criminal proceeding federal courts must
8 refrain from enjoining the state prosecution." That's on page
9 72 of the decision. And as I've said, courts -- judges in this
10 court have found the issuance of a criminal grand jury subpoena
11 to constitute state criminal proceedings for abstention
12 purposes.

13 The plaintiffs fair no better on the merits of their
14 application for a preliminary injunction. There is no
15 likelihood of success here. As I think your Honor has pointed
16 out and I won't belabor, they have no authority for the
17 breathtaking grant of immunity that they seek.

18 The Nixon and Sirica cases, as your Honor pointed out,
19 do stand for the proposition that a subpoena may be enforced
20 against a president. Their position, if accepted, would create
21 a nonjusticiable rule opening federal courts to anyone with a
22 state or federal grand jury subpoena to challenge that subpoena
23 on the basis of some claim, association, or affiliation with
24 the president. And I don't think that's a workable rule.

25 I would point out too that the legitimacy of their

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1 claim to immunity with respect to the Mazars subpoena is belied
2 by their failure to claim the same immunity with respect to the
3 subpoena issued to the Trump Organization itself. They've
4 complied in part with that subpoena, as they have complied in
5 other criminal investigations to date and at a minimum failed
6 to raise these same broad immunity arguments in the context of
7 those investigations and so I think the Court has to question
8 closely why they are raising these claims now in the context of
9 the Mazars subpoena.

10 The true risk of harm here falls on the state judicial
11 process and on the specific grand jury now impanelled and
12 investigating these matters.

13 THE COURT: Mr. Shinerock, on that point, the
14 investigation that you've alluded to clearly is very complex,
15 probably has a lot of difficult meanings, involves a lot of
16 parties, extends over many, many years. To what extent is the
17 grand jury sitting on its hands because they don't have the
18 material from this proceeding or is there nothing else that
19 they could do in the meantime while we resolve this issue?

20 MR. SHINEROCK: Your Honor, I'd request just a brief
21 moment to confer with our general counsel on that question, if
22 you would allow it.

23 THE COURT: All right.

24 (Counsel confer)

25 MR. SHINEROCK: Judge, what we can say is there are

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1 other subpoenas outstanding. There is some work that may be
2 done in the interim. Certainly the absence of the records that
3 are under consideration here present a substantial impediment
4 to their work but what I think I would say is that issue isn't
5 really what's before the Court. Their work is impeded to some
6 degree. The question before the Court really is whether the
7 plaintiff can come, bring a state agency before a federal court
8 and impede in any way an ongoing state criminal proceeding. I
9 think the answer to that is a resounding no.

10 Now, on the merits of their request for injunctive
11 relief, they fair no better, importantly, because they have
12 failed to establish irreparable harm. As I had suggested, the
13 true harm here falls on the state judicial process. The
14 plaintiff's burden today is to show not merely an unusual
15 factual situation which certainly I concede we have here, but
16 they must show an extraordinarily pressing need for immediate
17 federal equitable relief. And that's directly from a case that
18 we cite in the brief. They failed to meet that burden.

19 As we have said, our office will keep the documents in
20 confidence. The plaintiff has no basis to suggest otherwise.
21 The claims regarding changes to hundreds of years of grand jury
22 secrecy rules I think are just the type of speculative and
23 non-immediate harm that do not satisfy the standard for
24 emergency relief. Any harm resulting to the president's
25 claimed right to immunity, to the extent such a right exists,

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1 is entirely speculative and unripe at this point as well given
2 the early stages of the grand jury process. Indeed, allowing
3 that process to unfold further may generate an actual judicable
4 controversy for the Court but at this point there simply is no
5 controversy.

6 As I said before, the plaintiffs bear the burden here.
7 They have failed to carry it. Accordingly, Mazars should be
8 left to the orderly and the confidential production of
9 documents while any constitutional claims are litigated fully
10 and fairly in an appropriate forum.

11 Judge, if you have for further questions I'd cede the
12 rest of my time.

13 THE COURT: Thank you.

14 MR. CONSOVOY: May I be briefly heard, your Honor?

15 THE COURT: Yes. Mr. Consovoy.

16 MR. CONSOVOY: I'd like to make just six very brief
17 points, your Honor, and then return to the process at the end,
18 if I might.

19 One, the district attorney now concedes the president
20 is a target and his records are implicated.

21 Number two, the district attorney now concedes that
22 the merits are tricky.

23 Three, the district attorney now concedes there is a
24 circuit split on Younger and all of its contrary authority
25 predates Sprint.

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1 Four, the district attorney concedes that they copied
2 a congressional subpoena and sent it to Mazars even though they
3 now concede their investigation is not coextensive with the
4 federal investigation but they did it as a matter of
5 convenience. That is the very definition of bad faith.

6 Five, the district attorney has never said this
7 morning that the president has an avenue for relief through a
8 state process. We have cited authority that suggests he does
9 not.

10 Six, the district attorney never says that they would
11 reject the congressional subpoena if these documents are turned
12 over.

13 Finally, your Honor, the reason why we have guidance
14 from the Supreme Court in Nixon is because the subpoena was
15 stayed. The reason why we have guidance from the Supreme Court
16 in Eastland is because the subpoena was stayed. The reason why
17 we have guidance from the Supreme Court in Clinton v. Jones is
18 because those proceedings were delayed through the Eighth
19 Circuit on a legal point and the Supreme Court had the
20 opportunity to adjudicate the question.

21 The issue this morning is whether this serious
22 constitutional issue will remain ripe in the posture it is so
23 that both this Court, the Second Circuit, and potentially the
24 Supreme Court can issue an important decision, as your Honor
25 noted, on a very significant constitutional issue. These are

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1 serious questions and they should be decided in an appropriate
2 fashion.

3 And as we note in our reply, your Honor, the agreement
4 here runs at 1 p.m. today and the president is in the
5 unfortunate posture of having to decide how to proceed to
6 ensure the status quo is preserved if and when that 1 p.m.
7 deadline expires. So we respectfully request guidance from the
8 Court as to what next steps might look like in light of those
9 factors.

10 MR. DUNNE: Your Honor, may I?

11 THE COURT: Yes.

12 MR. DUNNE: I just want to punctuate one brief point,
13 your Honor. And that is Mr. Consovoy started earlier today by
14 saying that they are looking for quite limited relief which is
15 a stay of the obligation to produce these documents. But what
16 that means, of course, is what they're asking for further today
17 is additional delay. And that really is not just the quite
18 limited relief they are seeking; it is what they want in the
19 end. They otherwise characterize it as some temporary immunity
20 for however long. What that means, if they get further delay
21 basically is that they win and we lose without an adjudication
22 by this court and that's not what should happen today.

23 Thank you.

24 THE COURT: How do you see the loss there, Mr. Dunne?

25 MR. DUNNE: I'll just repeat the points we've made

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1 about irreparable harm, statute of limitations. They are all
2 very real. They are running. As to third parties as well, as
3 the Court has pointed out. And I just don't see the
4 irreparable harm in the face of, again, the grand jury secrecy
5 that applies to us. We just want to do what we do everyday
6 which is to gather documents in confidence and see what they
7 say and whether there should be any action taken as a result.
8 That's the harm to us. We have our own constitutional rights
9 under Younger, etc. that we're trying to vindicate here. We
10 just want to go home and do our grand jury work.

11 THE COURT: Do you believe that grand jury work would
12 be irreparably impeded if the Court were to wait let's say ten
13 days or so or two weeks that the U.S. Attorney has requested,
14 assuming that they do agree to interject themselves?

15 MR. DUNNE: Your Honor, it's absolutely -- first,
16 again, as to the request from the Department of Justice
17 Southern District last night, again, they're not before the
18 Court. They have not made any motion before the Court. They
19 have simply issued a statement, so-called, saying we'd like
20 another week to think about this. There is no such thing, your
21 Honor, as a motion to have the government cogitate, especially
22 given the emergency timetable that the parties agreed to last
23 Thursday in your chambers. So I would again suggest it's just
24 inappropriate and unnecessary at this point.

25 But more importantly, I think it's plain from

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1 everything that the plaintiff has said in its papers and today
2 that the real game plan today, again looking for as much delay
3 as possible, is to seek stays at every stage. No doubt
4 whatever the result of today's proceeding, and whether that
5 result is decided today or a week from today or whenever, the
6 plaintiff is going to appeal. And during that appeal there
7 will be further requests for a stay. They will appeal further
8 if necessary I believe, as they've said, to the Supreme Court
9 and there too they will be seeking a stay. They're envisioning
10 an at least months-long or longer process during which the
11 entirety of the obligations to produce these documents is
12 stayed, getting to a point where no doubt statutes of
13 limitations that we're concerned about will have run and
14 perhaps getting to a point where the president himself is out
15 of office at which point I think they concede we can then
16 proceed but at that point we'll have no charges available. So
17 I think that the stays we're talking about again mean they win,
18 we lose, and I think it's just inappropriate.

19 MR. CONSOVOY: Just to clarify two things. I want to
20 make sure that the court was aware that, as this court takes it
21 under advisement, the president is prepared to toll the
22 limitations period. So that should take some of the sting out
23 of it.

24 And second what I just heard the district attorney say
25 is we need to hurry because we may not be able to indict the

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1 president while he's still president if we don't. I don't
2 think it could be any clearer who the target here is.

3 MR. DUNNE: Your Honor, on both points I think that
4 this has been made clear. But whatever the grand jury is
5 looking at, and I'm not going to be specific about that, of
6 course, it's been made clear there is conduct at issue that has
7 been engaged in by a wide variety of parties and a wide variety
8 of businesses. The offer of tolling for whatever time period
9 they have in mind is very generous but they will not be tolling
10 the statute of limitations as to any of those other third
11 parties, whether they're businesses or individuals, and that
12 doesn't get us anything I'm afraid. And, again, I just don't
13 think that's going to get us what we need and I think that we
14 ought to go home and do our work.

15 THE COURT: Mr. Dunne, what you've said concerning the
16 likelihood of continuing appeals sounds like a statement of an
17 inevitability of some delay and the question is to what extent
18 should some of that inevitable delay at this stage be short or
19 longer.

20 Assuming that we were to agree that perhaps a short
21 stay would be appropriate, let's define short as follows. The
22 U.S. Attorney has requested until October 1 to make a
23 determination and until October 15 to make a submission if they
24 decide to make a submission. What if we agree that the U.S.
25 Attorney should have until let's say Monday to decide and until

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1 Wednesday to make whatever submission they're going to make?
2 Would that propose the same concerns or mitigate the concerns
3 that you have?

4 MR. DUNNE: Again, your Honor, that sounds very
5 reasonable and a very near-term basis but, again, my fear is
6 that this is just going to be extended again and again such
7 that any few days delay will only be followed on inexorably.

8 THE COURT: I have the ability to say to the plaintiff
9 that whatever judgment I make should be so irrefutable that
10 they should be enjoined from appealing.

11 MR. DUNNE: Understood, your Honor.

12 I just want to point out that, as we I think make
13 clear in our papers, we envision a scenario where these
14 important issues can, yes, be adjudicated, if they must, in
15 federal court, although we object to that, of course. But if
16 they are to proceed in federal court on appeal hereinafter,
17 given the need that our grand jury has for these materials and
18 given the fact that they will be maintained confidentially,
19 there is no need to impose a stay of the production during the
20 process in which these issues are adjudicated in federal court
21 if that's what has to happen. Again, that will solve the
22 problem of us not being able to get materials in the course of
23 our investigation in time. But, yes, again the issues can be
24 adjudicated as necessary on appeal. I just don't see that --
25 the risk of harm is such that the simple production of

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1 confidential materials to a confidential grand jury to be held
2 in secret is going to cause the harm they expect.

3 With respect to the rather extravagant claim that
4 there is a risk that somehow the New York state legislature
5 will invalidate the principles of grand jury secrecy after two
6 hundred years, I submit that that's not -- that's the kind of
7 fanciful speculation that an irreparable harm argument really
8 shouldn't rely on. I suppose it's also along those lines
9 possible that the State of New York could be annexed by Ukraine
10 who would invalidate the grand jury secrecy.

11 That's all fanciful, your Honor. It's not a basis to
12 make a judgment. And I think that we should be trusted with
13 these documents during the course of any subsequent appeal of
14 these proceedings.

15 THE COURT: Let me ask you again. Focusing on the
16 nature of the documents that are involved, is there one single
17 document that is at issue let's say, for example, the
18 president's tax returns or is it a much larger bundle of
19 documents of which the tax returns are one?

20 MR. DUNNE: It's the latter, your Honor, a much larger
21 bundle is a good way of putting it. As everyone seems to
22 agree, this is a wide range of request for documents of the
23 sort that we pursue quite commonly in our office. Yes, the tax
24 returns are a subset of those documents but there's a whole
25 range of other financial records that we're seeking here for,

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1 again, reasons which I can't get into but they are all in good
2 faith and so I don't think we can narrow it to a single
3 document or single category.

4 THE COURT: In that case, Mr. Consovoy, why could not
5 the parties work out some arrangement where some of that other
6 bundle of documents to the extent they don't relate directly to
7 the president could be turned over while we adjudicate the
8 question of the tax returns which seem to be the bone of
9 contention here?

10 MR. CONSOVOY: In candor, your Honor, it's beyond the
11 tax returns. That was sort of the impetus for the dispute. I
12 could walk the Court through it, but it's not really that
13 pertinent anymore.

14 But we object to the subpoena to the third party and
15 to the broad range of documents.

16 I think your Honor had it exactly right, which is we
17 are only asking for a short period of time before this court.
18 As your Honor noted, whatever happens after that will be for
19 the Second Circuit, the Supreme Court to decide. They may --
20 we hope the Court rules in our favor, of course, as every
21 litigant does. But if the Court does not, then the Second
22 Circuit may determine that the stay is inappropriate or the
23 Supreme Court may determine that a stay is inappropriate. All
24 we're asking for is time for the U.S. Attorney to weigh in,
25 time for the Court to issue a decision, and a very short period

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1 of time after that for us to seek further relief from the Court
2 of Appeals. We asked for seven days. It could be three days.
3 I think these requests --

4 THE COURT: You're not actually answering my question.
5 Whether it's three days or three weeks, assuming that part of
6 the bundle of documents is not really in controversy, why could
7 not you and the district attorney agree upon some program of
8 disclosure that addresses their concerns about the ongoing
9 investigation as to matters that may not necessarily relate to
10 the president's tax returns?

11 MR. CONSOVOY: Your Honor, I'd have to obviously, as
12 you understand, consult with my client. We attempted to engage
13 in negotiations before we came to this court. We've given over
14 reams of information already that were directly sought from the
15 organization, as we noted in our papers. This is not an issue
16 of noncompliance. This is about an inappropriate subpoena
17 where they photocopied a congressional subpoena and said here
18 you go.

19 THE COURT: I am raising a question of
20 continuing compliance in part.

21 MR. CONSOVOY: So we can -- it's impossible for me to
22 negotiate in open court. I imagine it would be a range of
23 documents that would be potentially OK. I've talked to my
24 client. There is a range of documents that, you know,
25 absolutely not. And then there's a middle ground, and I

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1 suspect negotiations between the parties will break down over
2 the middle ground. If the Court would like us to meet with
3 them and discuss this, we are happy to.

4 THE COURT: Mr. Dunne.

5 MR. DUNNE: Your Honor, my fear is that that middle
6 ground will expand to incorporate virtually everything except
7 routine correspondence among the various parties at issue here.
8 I mean the fact is that we can't be in a position where the
9 plaintiff's lawyers are the ones looking at the documents in
10 question, deciding which will pertain to their client or don't
11 pertain to their client when, in fact, their position is that
12 the client is everything, every business, every subsidiary,
13 every transaction. They can't be in the position to dictate to
14 us and make the judgments as to what is too close to their
15 client to be produced here. I don't think this is going to be
16 a fruitful negotiation, your Honor.

17 THE COURT: Well, perhaps it might be more fruitful if
18 it involved not just the two of you but some facilitation by
19 the court where documents could be submitted, as you
20 undoubtedly know from discovery disputes, to a magistrate judge
21 who decides whether or not a document falls in box A or box B.

22 MR. DUNNE: Obviously, your Honor, we'll comply with
23 whatever process the court wants to set up. I just don't know
24 what governing principles would guide the magistrate in
25 deciding what is, quote, too close to the president to produce

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1 or not in the context of a request for a range of documents
2 about a range of businesses, some of which, not all of which,
3 are actually owned by or presided over by him while he was --
4 before he was in office and I just don't -- I can't contemplate
5 what that process would look like. And, in fact, we would
6 instead suggest we just go back to the routine process we
7 undertake everyday which is getting materials, keeping them
8 secret, evaluating what they mean, and seeing whether any
9 action ought to be taken as a result. At that point, because
10 this is all very premature, only at that point, if we get to
11 the stage where we think there needs to be presented to the
12 grand jury potential charges against one or more parties or
13 people, perhaps at that point there will be something that
14 becomes more ripe. But right now we're just in the very early
15 stage of wanting to review materials. And this entire process
16 I think is really designed by the plaintiff to make sure that
17 doesn't happen.

18 THE COURT: Mr. Consovoy.

19 MR. CONSOVOY: I don't have much to add, your Honor.
20 We offered to meet and negotiate. We met and negotiated. The
21 district attorney does not want to discuss it. We were --
22 there's not a document Mazars has that we don't have in our
23 possession. Normally you come to the party who has the
24 document and ask them. They did. We complied. We had a
25 narrow dispute over the scope of that subpoena and the response

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1 was we're going to photocopy a federal subpoena, send it to
2 your accountants and see if we can strongarm them to comply
3 before you can get heard in court.

4 MR. DUNNE: I don't want to get into the backing and
5 forth that led to this dispute, but suffice it to say that,
6 again, the plaintiff's position, through his lawyers, was the
7 way this ought to work is you should tell us what you're
8 looking at. You should tell us what information you think you
9 need. We'll then go back and look at the documents and see if
10 there's anything that we want to give you that might be
11 responsive or not. And that's not how this process works, your
12 Honor.

13 THE COURT: It is the reality that when the parties
14 are acting unilaterally they take positions like that but when
15 they are acting under the auspices of a judicial officer there
16 is a referee who can make determinations.

17 I need not remind you, I'm sure, that in your
18 experience over many, many years you've been on both sides of
19 these kinds of disputes and there are magistrates, and please
20 don't underestimate their ability and experience in making
21 those kinds of judgments. Recently this Court had occasion, I
22 believe it was Judge Wood, who was presented with a question of
23 I believe in the Michael Cohen documents, which should be
24 disclosed, which should not be; which are privileged and which
25 are not. Judge Wood appointed special master in the form of

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1 Judge Jones and the matter was resolved.

2 MR. DUNNE: Your Honor, I'm aware of that case. And
3 obviously, again, we will comply with whatever process the
4 Court wants to put in place. And anything that in a
5 constructive way helps us get access to the information we need
6 in a timely fashion we would welcome.

7 THE COURT: All right. Would you then undertake to
8 stay the implementation or enforcement of the subpoena for an
9 additional period of time not to exceed let's say Wednesday of
10 next week and by that time the U.S. Attorney may or may not
11 have submitted whatever they may submit. If they do, I will
12 undertake from that point forward to examine the record and
13 make a judgment on the question of injunctive relief. But in
14 the meantime the parties can retain the status quo for an
15 additional week and also in the meantime if you can agree upon
16 some form of rolling disclosure that enables the investigation
17 to proceed as to matters that don't implicate the president's
18 privilege to the extent that any exists, I think that that
19 might go a long way towards accommodating both interests.

20 Mr. Dunne.

21 MR. DUNNE: Your Honor, obviously, we'll comply with
22 whatever the Court orders. But I don't think --

23 THE COURT: I'm trying not to order it. I'm trying to
24 see if you can agree so that I don't have to order it.

25 MR. DUNNE: Thank you, your Honor.

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1 With all due respect, I have to retreat to our more
2 important primary position, which is we don't believe that this
3 dispute belongs in federal court in the first place. And,
4 therefore, to agree to a process that keeps us here and which
5 at least tacitly acknowledges that this Court has the
6 jurisdiction and should be entertaining these arguments, I
7 appreciate the effort that to try to negotiate a solution that
8 gets us at least some portion of what we're asking for here,
9 but I'm afraid that we cannot in good conscience, given our own
10 Younger constitutional rights, our office, agree to that as a
11 matter of a concession here. Of course, we'll abide by
12 whatever order the Court directs toward us.

13 THE COURT: If I made an order, Mr. Dunne, and you
14 disagreed with it, then you're going to be in the position of
15 taking it up on appeal.

16 MR. DUNNE: That may be -- that may be something we
17 need to consider, your Honor, yes.

18 In other words, I don't want to seem obstinate but our
19 position is that this production should ensue. And, again, if
20 it needs to ensue while this is still being adjudicated in
21 federal court, we'll abide about that and respond in federal
22 court. But I think we simply cannot agree that the production
23 should be stayed given our Younger concerns and given our very
24 strong view that there's just no good faith basis for the
25 plaintiff to be objecting to it given the lack of harm.

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1 THE COURT: I am inclined to grant the U.S. Attorney's
2 request for a few days to determine whether or not there is
3 some basis for the U.S. Attorney or the Justice Department to
4 make whatever statement they think may be helpful for the
5 resolution of the dispute here. I will grant until Monday of
6 next week for the U.S. Attorney to consider the issue and
7 inform the Court as to whether or not the U.S. Attorney and/or
8 the Justice Department will seek to intervene in some form. If
9 they choose to do so by some submission, I will give a deadline
10 of next Wednesday for that submission to be made. If the
11 submission is sufficient on paper for the Court to decide, I
12 will close the matter at that point from further filings and
13 endeavor to make a decision very soon thereafter. And I assure
14 you that it will not be weeks or months.

15 Now, given that schedule, I would suggest that the
16 parties go home, sober up, decompress, perhaps get together
17 again between now and tomorrow and see whether some way may be
18 found to accommodate the concerns that have been expressed from
19 both sides.

20 Now, in the meantime I recognize that there is a
21 deadline of 1 p.m. today by which the subpoena should be
22 enforced. The district attorney has not indicated an
23 inclination to agree voluntarily to a stay of any length and
24 essentially invited the Court to make an order. I will then
25 order the stay of a subpoena for one day to enable you to, as I

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1 said before, go home and think about this and talk to one
2 another and inform the Court by tomorrow whether a further
3 agreement might be in order.

4 MR. DUNNE: Thank you, your Honor.

5 MR. CONSOVOY: The only remaining issue, your Honor,
6 is if the Court ultimately does not stay the subpoena through
7 the period where you've given the U.S. Attorney, I just want to
8 reiterate our request for some period of relief after so we can
9 seek recourse in the Court of Appeals.

10 THE COURT: That's the agenda for tomorrow.

11 MR. CONSOVOY: Yes. Thank you very much.

12 (Adjourned)